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No. 71-804

In the

Supreme Court of the United States

OCTOBER TERM, 1971

GABRIEL WOLFF,

Petitioner,

vs.

HERBERT F. KORHOLZ, MARTHA KORHOLZ and THE SUSQUEHANNA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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HERBERT F. KORHOLZ, MARTHA KORHOLZ and THE SUSQUEHANNA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gabriel Wolff prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit dated September 21, 1971.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois entered no opinion and rendered its decision on June 10, 1969.

The opinion of the United States Court of Appeals is reported at 449 F.2d 82, (7th Cir. 1971) and appears at A.1.[1]

[1] References to the Appendix are noted as "A" followed by the page number and references to the Record are noted in similar manner using the abbreviation "R." References to plaintiffs' and defendants' exhibits are respectively designated as "PX" or "DX" followed by the number.

JURISDICTION

The decision of the Court of Appeals was dated September 21, 1971 and rehearing was not requested.

Certiorari jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether in a §16(b) case in determining the purchase price of 430,000 shares of stock obtained by an insider in a "short swing" transaction, the quotation price for 100 share lots as determined by reference to the "bids" and "asks" in the over-the-counter market on a particular date have any probative value for determining the value of in excess of 1 million shares.

2. Whether in a §16(b) case in determining the purchase price of 430,000 shares of stock obtained by an insider in a "short swing" transaction, an *average* of the "bids" and "asks" quotations in the over-the-counter market on a particular date may be used.

3. Whether in a §16(b) case the purchase price of 430,000 shares of stock obtained by an insider on a particular date in a "short swing" transaction may be determined by reference solely to the over-the-counter market "bids" and "asks" on a particular date without regard to the appraisals of those shares made by admittedly well qualified experts for purposes of a corporate marger which gave rise to the purchase of which complaint was made.

4. In a §16(b) case is market value the sole criteria of the value of shares of stock when determining the profit occasioned in a "short swing" transaction.

5. May a controlling stockholder who in a merger receives the same price per share as all minority stockholders

attach for §16(b) purposes an arbitrary and unrealized value to his shares as a control premium in order to avoid §16(b) liability which existed without such addition.

STATUTES INVOLVED

Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78p(b)) reads as follows:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased of or not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

STATEMENT OF THE CASE

Petitioner Gabriel Wolff, a stockholder of The Susquehanna Corporation ("Susquehanna"), filed a derivative complaint based upon §16(b) of the Securities Exchange Act of 1934 on behalf of Susquehanna against Herbert F. Korholz ("Korholz") and his wife. Federal jurisdiction was based upon §27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa). The gravamen of the action was (i) that Korholz was a director and a beneficial owner of in excess of 10% of the capital stock of Susquehanna and controlled Susquehanna, (ii) Korholz sold 430,000 Susquehanna shares to American Gypsum Company ("Gypsum"), another corporation which he controlled, for approximately $6,500,000 or $15.11 per share, (iii) within six months thereafter, Korholz caused Gypsum to be merged into Susquehanna, the merger being based upon an evaluation of $10.75 per Susquehanna share and $5.65 per Gypsum share, whereby Korholz purchased in excess of 430,000 Susquehanna shares, and (iv) the foregoing occasioned a "short swing" profit of approximately $4.36 per share, all in violation of §16(b) of the Securities Exchange Act of 1934.

At trial petitioner relied entirely upon documents consisting of, among others, reports to the Securities and Exchange Commission made by Korholz as required by §16(a) of the Securities Exchange Act (15 U.S.C. §78p(a)) reflecting sales and purchases of the Susquehanna shares by him, documents obtained from Susquehanna evidencing the sale and merger of Gypsum into Susquehanna which gave rise to the purchase, and reports to the Securities and Exchange Commission by Gypsum and Susquehanna in which the purchase and sale were reflected.

On the question as to whether Korholz realized a §16(b) profit, petitioner relied upon appraisals of the business and

shares of Gypsum and Susquehanna made by New York Hanseatic Corporation and Stone & Webster Service Corporation at the request of Korholz for use in connection with his merger of Gypsum into Susquehanna. These appraisals valued Gypsum shares at $5.65 and Susquehanna shares at $10.75 and resulted in a 1.9 to 1 merger ratio of Gypsum to Susquehanna shares. Since Korholz had sold Susquehanna shares at $15.11 per share and purchased shares at $10.75 within a six month period at a profit it was alleged that a "short swing" profit was made by Korholz and for which recovery was sought in an amount in excess of $1,600,000.

The trial court, ignoring the New York Hanseatic and Stone & Weber appraisals, decided the "profit realized" question adversely to the petitioner. In this connection the lower court found that (i) on December 13, 1965, (the effective date of the merger of Gypsum into Susquehanna) the average of the "bid" and "ask" quotations in the over-the-counter market for Gypsum shares was approximately $6.875, (ii) since Korholz controlled Gypsum, there should be added to the value of his shares a premium of 20%, and (iii) the merger ratio was 1.9 Gypsum shares for each Susquehanna share. Based upon the foregoing, the trial court concluded that a Susquehanna share was worth in excess of $15.11 and therefore Korholz made no "short swing" profit, the price at which Korholz had sold Susquehanna shares.

Upon appeal, the court below assumed that petitioner had made out a case as to a sale and a purchase by Korholz of his Susquehanna shares sufficient to establish §16(b) liability. However, it approved and accepted the trial court's use of the "average" ($6.875) of the "bids" and "asks" in the over-the-counter market of the Gypsum shares on December 13, 1965 and its addition of a control

premium of 20% to that average. Under the formula, the Court of Appeals found that Korholz made no profit on the "short swing" transaction. The court at footnote 3 (A. 6) in apparent rejection of the appraisals found that the appraised values were not market values and stated:

> "On the other hand, the $5.65 per share value of Gypsum was the 'going concern' value based upon the experts' analysis of earnings, appropriate capitalization rate and other factors. These figures were not intended to represent the market price in August, 1965, or at any other time. As far as market value is concerned, the figure could at best be characterized as the experts' view on what the market price *should* be. It *would* be such only if all investors shared the experts' interpretaion of each of the many divergent factors affecting market value."

Thus the lower court's decision was affirmed.

REASONS FOR GRANTING THE WRIT

Each of the Questions Presented has been answered in the affirmative in the court below.[2] Those answers are in derogation of the purpose for which §16(b) was enacted, will defeat its enforcement and are in conflict with many decisions of other Circuits, as is now shown.

I. Conceding, Arguendo, That Over-The-Counter Quotations Have Any Probative Value in the First Place, Use Of An "Average" Quote When Calculating "Short Swing" Profits Seriously Undermines the Legislative Purpose of Section 16(b) and Is In Conflict With Decisions in Other Circuits.

The Court of Appeals approved of the trial court's use of the "average"[3] price of Gypsum shares in the over-the-counter market on December 13, 1965 (the effective date of the merger and thus the date of purchase by Korholz of his Susquehanna stock) as the base from which profits were to be calculated. In so doing the Court of Appeals not only seriously undermined the legislative purpose of §16(b) but departed from precedent.

The purpose of §16(b) is set forth in *Feder* v. *Martin Marietta*, 406 F.2d 260 (2nd Cir. 1969) at p. 262:

> "The purpose of §16(b) as succinctly expressed in the statute itself is to prevent unfair use of information by insiders and thereby to protect the public and outside stockholders. The only remedy which the framers of §16(b) deemed effective to curb insider abuse of advance information was the imposition of a liability based upon an *objective measure of proof*, e.g.,

---

[2] A negative answer to any one of them would have resulted in "profit realized" under §16(b).

[3] The term average is in quotes since Korholz's witnesses each employed a different combination of a "bid" and "ask" quotation to obtain the value of Gypsum's shares in the over-the-counter market.

Smolowe v. *Delendo Corp.*, 136 F.2d 231, 235 (2nd Cir.), *cert. denied*, 320 U.S. 751 (1943). *Thus, application of the act is not conditioned upon proof of an insider's intent to profit from unfair use of information*, e.g., *Blau* v. *Lamb*, 363 F. 2d 507, 515 (2nd Cir., 1966), *cert. denied*, 385 U.S. 1002 (1967), *nor upon proof that the insider was privy to any confidential information*, e.g., *Ferraiolo* v. *Newman*, 259 F.2d 342, 344 (6th Cir., 1958), *cert. denied*, 359 U.S. 927 (1959). *Rather, §16(b) liability is automatic, and liability attaches to any profit by an insider on any short-swing transaction embraced within the arbitrarily fixed time limits of the statute.*" (Emphasis added.)

See also *Bershad* v. *McDonough*, 428 F.2d 693, 696 (7th Cir. 1970); *Magida* v. *Continental Can Co.*, 231 F.2d 843, 846 (2nd Cir. 1956); *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 237-39 (2nd Cir. 1943); *Blau* v. *Max Factor*, 342 F.2d 304, 307-308 (9th Cir. 1965); *Park and Tilford, Inc.* v. *Schulte*, 160 F.2d 984 (2nd Cir. 1947); *Western Auto Supply Co.* v. *Gamble Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965); and *Volk* v. *Zlotoff*, 285 F.Supp. 650, 654-56 (S.D.N.Y. 1968).

Thus in essence §16(b) reflected the exchange of certainty of imposition of liability without proof of intent to take advantage of or even knowledge of inside information by the insider for certainty of non-imposition of liability if the arbitrary but known limitations contained in §16(b) were observed. This section of the statute was highly remedial and although at times harsh, was the remedy thought to be the most effective to combat flagrant abuse of insider information. See S.Rep. No. 1455, 73rd Cong., 2nd Sess. 55 (1934) as repeated in many opinions, e.g., *Volk* v. *Zlotoff*, *supra* at ftn. 2.

In conformance with the remedial purpose of §16(b) it was early determined that when any reasonable choice was available, one imposing liability or maximizing profit and

the other not imposing liability or minimizing profits, the former choice has always been taken. *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 235 (2nd Cir. 1943); *Gratz* v. *Claughton*, 187 F.2d 46 (2nd Cir. 1951); *Booth* v. *Varian Associates*, 334 F.2d 1 (1st Cir. 1964) ("... purchase date within recovery period should be selected . . ."), and *Ferraiolo* v. *Newman*, 259 F.2d 342, 345 (6th Cir. 1958). See also discussion in *Blau* v. *Oppenheim*, CCH Fed. Sec. L. Rep. ¶91,630 (S.D.N.Y. 1966) Transfer Binder, '64-'66 Decisions.

As a result of the foregoing whenever the use of an "average" price was suggested as the manner in which stock was to be evaluated, it was rejected on the basis of *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 239 (2nd Cir. 1943). The *Smolowe* doctrine requires that in §16(b) cases the courts are obliged to squeeze out all possible profits so as to prevent the breaches of fiduciary duty by the insider and thus effectuate the remedial concepts embodied in that section. As examples of the rejection of averaging in the context of §16(b), see *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 239 (2nd Cir. 1943); *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F.Supp. 962, 968 (S.D.N.Y. 1965); *Heli-Coil Corporation* v. *Webster*, 222 F.Supp. 831, 837 (D.C.N.J. 1963), modified 352 F.2d 156, 171 (3rd Cir. 1965); *Blau* v. *Lamb*, 242 F.Supp. 151, 160-61, 163 (S.D.N.Y. 1965) (specifically rejecting the use of an average price and citing *Marquette Cement* v. *Andreas*), aff'd. in part, rev'd in part, 363 F.2d 507 (2nd Cir. 1966); and *Blau* v. *Lehman*, 173 F.Supp. 590, 595 at ftn. 3 (S.D.N.Y. 1959), aff'd. 286 F.2d 786 (2nd Cir. 1960), aff'd 368 U.S. 403 (1962).

The use by the Court of Appeals and the lower court of the average in the over-the-counter market of the high "bid" and low "ask" is completely in conflict with these decisions and contrary to the purposes of §16(b). This is especially so in view of the reasonable choices available as an alternative to "averaging," i.e. the merger appraisal of

$5.65 for each Gypsum share, the low bid on December 13, 1965 of $6.00 for each Gypsum share and proof of purchases by Gypsm of 206,000 shares of Gypsum stock in the over-the-counter market for a price of approximately $5.82 per share during pertinent times. (DX 13, Item 14).

II. The Application of a 20% Control Premium Not Only Was Improper in the Context of This Case But Serves To Add Uncertainty and Expense of Enforcement to An Area of Law Which Is Dependent Upon Certainty and Ease of Enforceability.

If in the context of a statutory merger and a merger agreement explicitly providing that all stockholders were to be treated equally, the insider can successfully assert that his block of stock is worth a premium, the battle of experts in the area of §16(b) litigation has begun and ease and certainty of enforcement by small shareholders has ended. In the case of a §16(b) violation by a controlling stockholder, the action by stockholders is the only effective remedy and this remedy is much blunted by the knowledge that he is entering on a battlefield in which experts are able to argue as to the percentage to be added as a premium for control.

The matter of the payment of premiums for control is becoming more and more a matter of concern and of tremendous importance to vast numbers of minority shareholders. Many views are expressed as to their rights under such circumstances. Letts, Sales of Control Stock and Rights of Minority Shareholders, 26 Business Lawyer 631 (January, 1971). The decision below not only gives carte blanche approval to the payment of such premiums but does this under the most absurd circumstances in a situation where the element of control was not even a factor. All shareholders were treated alike in the merger of Gypsum into Susquehanna.

It is also absurd to apply a premium for control in a situation involving a merger of two corporations, both of which are controlled by the insider prior to the merger and the surviving corporation being controlled after the merger. It was not disputed at trial that a premium for control is paid only when demanded by a seller and Korholz being in control of Susquehanna and Gypsum neither demanded from nor paid such a premium to himself.

Further, although all stockholders were treated equally by the merger agreement, if the block of shares owned by Korholz were deemed to have a greater value, then another block of shares in the same merger, the minority, has a lesser value. This illustrates the impropriety of the use of control premiums in the context of merger.

The evasion of §16(b) liabilities by permitting such ephemeral evaluation based on non-existent facts can only result in eroding the enforcement of §16(b).

III. The Use of Hypothetical Valuations When Determining §16(b) Profits Rather Than The Valuations Agreed Upon By the Parties As The Basis of the Purchase Impedes Enforcement of §16(b) Liability.

Although the appraisals by New York Hanseatic Corporation and Stone & Webster Service Corporation valuing Gypsum and Susquehanna at $5.65 and $10.75, respectively, served as the basis for the terms of the merger of Gypsum into Susquehanna as approved by Korholz, the lower courts relied upon a hypothetical market value as modified by a hypothetical premium for control so as to eliminate all "short swing" profits. Possibly resort to hypothetical values as determined by experts is necessary in the absence of the setting of a price by the parties to the short swing transaction of which complaint is made. However, in the face of a valuation agreed upon the use of hypothetical values merely furnishes the insider with another chance

to employ expensive experts to prove after the fact that the prior evaluations given by him to shares sold were incorrect.

This approach to creative evaluation is contrary to the Second Circuit's decision in *Stella* v. *Graham-Paige,* 259 F.2d 476 (2nd Cir. 1958) wherein at p. 478 it is stated:

> "Many factors enter into value. The weight to be given to these factors involves the business judgment of the bargaining parties. In the absence of fraud or self-interest, the judgments of corporate directors representing KF and GP are not lightly to be disregarded. As the threshold of the transaction the directors of KF had to determine the price to be paid for the GP assets. If KF, instead of issuing 750,000 shares of stock to GP, had paid $7,500,000 for the assets transferred because of the special and unique value which they had to KF, this dollar amount would have represented to KF and GP the value of the assets."

To permit such reevaluations would completely emasculate enforcement of §16(b). Every insider could claim that although he purchased shares at $1, the real value was $2 and thus no short swing profit or liability was incurred.

Section 16(b) proscribes to the insider ". . . any *profit realized* by him from any purchase and sale . . ." (emphasis supplied). The distinction between profit realized (the concept condemned by §16(b)) and value as employed by the Court of Appeals must be made. If in the actual transaction which gives rise to the §16(b) purchase or sale there is agreement as to price (or as in this case independent appraisers set the price) upon which the transaction is based and that price is received, then other prices or other valuations are irrelevant. Here Korholz hired appraisers, approved of their evaluations and based the "purchase" of the Susquehanna shares upon these evalu-

ations. If the appraisers were later found to be in error and Gypsum was worth $10 per share—of what relevancy is that fact since Korholz has already accepted $5.65 and if he made a profit that sum was fixed by the evaluation of $5.65. By similar analysis, no matter how valuable, the "sale" by gift of appreciated securities does not give rise to §16(b) profits. *Shaw* v. *Dreyfus*, 172 F.2d 140 (2nd Cir. 1949) and *Truncale* v. *Blumberg*, 80 F.Supp. 387 (S.D.N.Y. 1948) aff'd, 182 F.2d 1021 (2nd Cir. 1950).

IV. The Use of Over-The- Counter Quotations To Establish Valuation of Korholz's Holding of 56% of Gypsum is Illogical and Contrary to Decisions of Other Courts.

Acknowledging that there were no actual trades of Gypsum stock on December 13, 1965 and that over-the-counter quotations are based upon 100 share lots (A. 9, 10), the Court of Appeals nevertheless accepted these quotations as the base from which Korholz's over 1,000,000 shares of Gypsum were valued.[3] The exhaltation of the over-the-counter quotations is unprecedented in §16(b) litigation and contrary to two recent lower court opinions.

The true nature of the over-the-counter quotations was recently discussed in *Kramer* v. *Ayer*, 317 F.Supp. 254 (S.D.N.Y. 1970). The Court said at p. 260:

> "More importantly, and as already indicated, throughout his argument plaintiff consistently confuses bid and asked quotations with market prices and uses these terms interchangeably, ignoring thereby the essential differences which exist between bid and asked quotations and market prices. Bid and asked quotations are not market prices. They do not represent actual transactions whereas market prices are derived only from actual sales of shares of stock.

[3] Korholz and his wife owned in excess of 1,000,000 Gypsum shares for which they received approximately 526,700 Susquehanna shares.

> At the very best bid and asked quotations are nothing more than offers to buy and offers to sell. And sometimes these offers to buy and to sell are not firm so that very often it cannot even be said that a stock necessarily can be sold at the bid figure to be bought at the asking figure. These facts are not unknown to market participants; the court can only guess at why plaintiff has confused the issue in the manner that he has. Indeed, at the bottom of the very report of the National Quotations Bureau submitted by plaintiff it says that 'The above quotations represent prices between dealers and do not include retail mark-up, mark-down or commission. They do not represent actual transactions, and have not been adjusted for stock dividends or splits.'"

Parenthetically, the National Quotation sheets relied upon by Korholz to establish the over-the-counter market quotations contained the same restrictive legend. (See DX 118, 120).

In *Franklin National Bank* v. *L. B. Meadows & Company,* 318 F.Supp. 1339 (E.D.N.Y. 1970), the court stated, pp. 1341, 1343:

> "'Pink sheets' are published daily by National Quotation Bureau, Inc.; they are formally known as the National Daily Quotation Service. Subscribers include broker-dealers as well as various banks. The former, known as listing subscribers, place bid (will buy at) and ask (will sell at) quotations in the 'pink sheets' for various over-the-counter securities. These are offers and do not reflect completed transactions. When doing this for one stock over a period of time, the broker-dealer is said to be 'making a market' in that security. See L. Loll and J. Buckley, The Over-The-Counter Securities Markets 146 (2d ed. 1967). Each quotation in the 'pink sheets' obligates the broker-dealer to a one-hundred share transaction at the stated price. Any larger sale is a matter for negotiations. See generally L. Loss, Securities Regulation 3318-27 (2d ed. 1961); Burns, Over-The-Counter

Market Quotations: Pink Yellow, Green and White Sheets—A Gray Area in the Law of Evidence, 52 Cornell L.Q. 262 (1967)."

• • •

"Broker-dealers also trade in great numbers and varieties of securities. L. Loll and J. Buckley, The Over-The-Counter Securities Markets 142-143 (2d ed. 1967). Some commentators have claimed that 'pink sheets' too often include 'illusory, misleading, and fictitious quotations.' Burns, Over-The-Counter Market Quotations: Pink, Yellow, Green and White Sheets—A Gray Area in the Law of Evidence, 52 Cornell L.Q. 262, 268 (1967."

To employ these quotations which are rather inaccurate as applied to 100 share lots as a base from which by mere multiplication to value 1 million shares serves to magnify the error so that the result is legally unacceptable.

CONCLUSION

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its opinion dated September 21, 1971.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970—APRIL SESSION, 1971

No. 18053
PAUL MUELLER and GABRIEL WOLFF,
Plaintiffs-Appellants,
v.
HERBERT F. KORHOLZ, MARTHA KORHOLZ and THE SUSQUEHANNA CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 21, 1971

Before KILEY, FAIRCHILD and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiff-appellant, a shareholder of Susquehanna Corporation, contends that the second and third steps of a three-step transaction produced a "short-swing" profit for defendant Korholz, a Susquehanna director, which is recoverable on behalf of Susquehanna pursuant to § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). Defendants contend that the second step was not a "sale" within the meaning of the Act and, in any event, there was no "profit realized by" Korholz from either the entire transaction or just the last two steps.

After a full trial, the district court made extensive findings of fact sustaining these defenses. In our opinion the findings that Korholz realized no profit are well supported by the record and, therefore, we do not reach the issues raised by the first defense. Nevertheless, a description of the entire transaction is essential to an understanding of the case.

I.

The three steps took place on May 25, July 2, and December 13, 1965.

A. On May 25, 1965, Korholz acquired 430,000 shares of Susquehanna common stock at a price of $15 per share. Before making this acquisition Korholz had reached at least an informal understanding with four other interested parties.

1. The sellers (referred to as the "Lannan Group") advised Korholz early in May that their Susquehanna stock was available for purchase at a price of $15 per share, payable in cash, provided that the transaction could be closed promptly. Since they were to be paid in cash the Lannan Group was apparently willing to sell either to Korholz individually or to American Gypsum Company (Gypsum). Korholz was a director of Gypsum and with his family owned 56% of its stock.

2. The First National Bank of Boston ("the Bank") agreed to lend $6,500,000 to Gypsum to finance the purchase provided that it could be assured of a first lien upon Gypsum's assets as well as a pledge of the Susquehanna shares to be purchased. The condition could not be satisfied by Gypsum without the consent of two insurance companies from which it had borrowed substantial funds in March. After the insurance companies indicated their willingness to consent on certain conditions, and after Korholz and Gypsum indicated that the conditions could be met, the Bank agreed to make an interim loan to Korholz individually, which would be replaced within 30 days by a loan to Gypsum. Before any funds were

disbursed in consideration of the note signed by Korholz personally, the Bank had received the substitute note and other documents executed by Gypsum, as well as telegraphic confirmation of the insurance companies' informal consent.

3. The two insurance companies agreed to consent to the bank loan secured by a first lien on Gypsum's assets on three conditions:

(a) that Gypsum would agree to repay the bank loan upon a merger of Gypsum into Susquehanna;

(b) that the proceeds of any sale of Gypsum's Albuquerque plant be used to reduce the bank loan; and

(c) that Korholz and two other Gypsum directors be elected to Susquehanna's board.

In telegrams sent to Gypsum on May 12 and May 14, the insurance companies evidenced their consents subject to these specific conditions.

4. The Gypsum board of directors decided at a meeting on May 12, 1965, to acquire the Susquehanna shares for the price specified by the Lannan Group; to make the bank loan; and to accept the conditions requested by the insurance companies. Since the Bank was unwilling to advance funds to Gypsum until after its loan agreements with the insurance companies had been formally amended to evidence their consents, and since the Lannan offer would expire before the amendments could be drafted, approved and executed, the Gypsum board adopted a resolution providing that if Korholz acquired the stock individually, and if the consents were obtained within one month, Gypsum would acquire the stock from Korholz at his exact cost.[1]

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[1] The directors' resolution read, in part:

"WHEREAS, it is the consensus of this Board that it would be in the best interest of this company to acquire the aforesaid shares of Susquehanna at said price and but for the necessity of obtaining the con-

The resolution specified that Gypsum would be under no obligation to Korholz if the consents were not received within one month.

As contemplated by the May 12 resolution of the Gypsum board, and by the informal understanding with the Bank and the insurance companies, Korholz purchased the Susquehanna shares on May 25, 1965. The transaction was closed through an escrow. As noted, before the funds were disbursed the escrow deposits were made not only by the sellers and Korholz, but also by Gypsum which had executed an undated note and other documents contemplating a transfer of the transaction to it as soon as the documentation was concluded. The purchased Susquehanna shares were issued in the name of a nominee and held by the Bank, originally as security for Korholz's note and later for Gypsum's.

If the scriveners had completed their work before June 12, 1965, the conditions specified in the directors' resolu-

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[1] (Continued)

sent of insurance companies to which this company is indebted to waive restrictions under certain note agreements, this Board would adopt a resolution authorizing the purchase of said shares of Susquehanna at that price; and

"WHEREAS, it is the desire of this Board to place the company in a position to acquire said shares contingent upon the consent of insurance companies; and

"WHEREAS, Herbert F. Korholz and Martha Korholz have indicated their willingness to attempt to acquire said shares as their own property at a price of $15.00 per share, and to bind themselves to sell said shares, if acquired, to the company at that price if and when impediments to acquisition by the company are removed, and this company has indicated to Herbert F. Korholz and Martha Korholz that it will acquire from them said shares for a price equal to the price paid by them, together with costs and expenses . . . incident to said acquisition, if the insurance companies . . . agree to the modification of the Indenture Agreements enabling this company to acquire said shares;

tion would have been performed to the letter and this litigation would never have arisen.

B. On July 2, 1965, Gypsum acquired the 430,000 shares of Susquehanna stock from Korholz for $6,499,028.96, equivalent to a price of $15.114 per share. The amount was equal to the price paid to the Lannan Group, plus interest on the interim loan and other costs attributable to the transaction.

The formal amendments to the agreements with the insurance companies were executed "as of" June 9, 1965, but their execution and delivery was not actually completed until after June 12, 1965. The legal consequences of the failure to meet the deadline are the subject of extensive factual and legal argument, but for purposes of our decision we make the somewhat theoretical assumption that between June 12 and July 2 Korholz had the legal right to act as sole owner of the Susquehanna

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[1] (Continued)

"NOW, THEREFORE, BE IT RESOLVED: That if Herbert F. Korholz and Martha Korholz acquire 430,000 shares of Susquehanna at $15.00 per share and if consents are first had and received from the insurance companies to which this company is indebted under certain loan indentures permitting acquisition of said shares, the company will acquire from Herbert F. Korholz and Martha Korholz said approximately 430,000 shares of the common stock of The Susquehanna Corporation at $15.00 per share, together with reimbursement to Herbert F. Korholz and Martha Korholz of any costs and expenses (including any interest expense incurred by them) incident to said acquisition; provided that such consents are received within one month from the date of this resolution. If such consents are not received, the company shall be under no obligation to Herbert F. Korholz and Martha Korholz in connection with their acquisition of said shares. If Herbert F. Korholz and Martha Korholz do not acquire said shares, they shall be under no obligation to the company in connection thereunder."

stock. On this assumption, he sold it to Gypsum on July 2, 1965.

C. On December 13, 1965, Gypsum was merged into Susquehanna. For each 1.9 shares of Gypsum stock, Korholz and his wife, like all other Gypsum shareholders, received one Susquehanna share. In exchange for their block of Gypsum, they acquired over 430,000 shares of Susquehanna.[2] Thus, less than six months after his "sale" of Susquehanna to Gypsum on July 2, 1965, Korholz made a "purchase" of a larger block by reason of the merger.

The experts who were employed to recommend an exchange ratio made an appraisal of the value of each company's shares in August, 1965. The 1.9 to 1 exchange ratio reflected appraised values of $10.75 and $5.65 per share of Susquehanna and Gypsum, respectively. On the basis of these appraised values, plaintiff contended that Korholz had paid a price of $10.75 per share for the Susquehanna stock acquired by the merger. He thus allegedly realized a profit of $4.364 per share, representing the difference between $10.75 and the price of $15.114 received on July 2, 1965.[3]

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[2] Korholz received 386,102; Mrs. Korholz received 140,171.

[3] Plaintiff omits mention of the fact that appraisal values determined for reorganization purposes are not market values. Susquehanna's $10.75 per share value was the so-called "break up" value determined by valuing all of Susquehanna's assets and dividing the total by the number of outstanding shares. On the other hand, the $5.65 per share value of Gypsum was the "going concern" value based upon the experts' analysis of earnings, appropriate capitalization rate and other factors. These figures were not intended to represent the market price in August, 1965, or at any other time. As far as market value is concerned, the figure could at best be characterized as the experts' view on what the market price *should* be. It *would* be such only if all investors shared the experts' interpretation of each of the many divergent factors affecting market value.

Alternatively, on appeal plaintiff makes two additional arguments. First, noting that over-the-counter quotations immediately prior to the merger were about $13.00 for Susquehanna and about $7.00 for Gypsum, he contends that current market values established a profit of $2.00 per share. Second, he contends that the burden of disproving a profit should have been placed on Korholz as a fiduciary who had breached his trust to Susquehanna shareholders by engaging in a "short-swing" transaction.

The district court found that Korholz had made no profit. Instead of concentrating attention on the value of the Susquehanna shares received by Korholz as a result of the merger, the court focused on the value of the consideration which Korholz exchanged for that stock. That consideration, he found, was a control block of Gypsum stock which had a value greater than the market value of individual Gypsum shares. Based on expert testimony offered by defendants, the court found that the value of the consideration surrendered by Korholz on December 13, 1965, was in excess of $15.11 for each share of Susquehanna stock received. On the basis of these findings of fact, Korholz derived no profit from the transaction.

II.

We first consider plaintiff's final argument relating to burden of proof. The short answer to this argument is that defendant did assume the burden of proving that he paid more for the Susquehanna shares that he acquired in December than he had received for those he sold in July. The district court found that this evidence was reliable and sufficient and sustained that burden.

In addition, we note that plaintiff's entire case is predicated on acceptance of a truncated version of the transaction as including only steps two and three. If we view the transaction as a whole, it is plain that Korholz gained nothing but the benefits of the merger itself. As originally intended, and as ultimately consummated, his participation in steps one and two was entirely for the

benefit of Gypsum and its stockholders.[4] There is not the slightest evidence of overreaching or lack of good faith. In contrast to the facts disclosed in typical cases imposing a severe burden of justification on a faithless fiduciary,[5] if liability attaches here, it will result not from the character of the business behavior, but solely from counsel's failure to structure the transaction in a somewhat different form or to conclude necessary documentation more promptly. Nevertheless we accept plaintiff's truncated version of the transaction for purposes of our decision.

III.

The price of $15.114 per share received by Korholz on July 2, 1965, was a derived price, computed by dividing the aggregate amount of his reimbursement ($6,499,028.96) by the number of shares in the block (430,000). The "price" which Korholz paid for the block of Susquehanna shares received on December 13, 1965, is necessarily also a derived price, which must be computed by dividing the value of the consideration which he surrendered by the number of Susquehanna shares he received. See *Stella* v. *Graham-Paige Motors Corp.*, 259 F.2d 476, 479 (2nd Cir. 1958), *cert. denied*, 359 U.S. 914; *Blau* v. *Mission Corp.*, 212 F.2d 77, 81 (2nd Cir. 1954), *cert. denied*, 347 U.S. 1016. Contrary to plaintiff's argument, the value of the Susquehanna shares which Korholz received, whether measured by the appraisals in August or by the market value in December, is not of controlling importance.

As consideration for the Susquehanna shares acquired on December 13, Korholz parted with a block of Gypsum stock which represented control of that company. Two

[4] Indeed, the predicate for plaintiff's entire statutory case is a denial of a continuing fiduciary relationship between June 12 and July 2, 1965.

[5] *Pepper* v. *Litton*, 308 U.S. 295, 306; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 599; *Shlensky* v. *South Parkway Building Corp.*, 19 Ill.2d 268, 280-81, 166 N.E. 2d 793, 800-01 (1960).

well qualified experts[6] testified that such a block has a greater value per share than individual shares. The trial court credited this testimony and we do not understand plaintiff to dispute this basic proposition. *Cf., Essex Universal Corp.* v. *Yates*, 305 F.2d 572, 576 (2nd Cir. 1962); *Royal Trust Co.* v. *Equitable Life Assur. Society*, 247 F. 437, 441 (2nd Cir. 1917). However, plaintiff does attack the experts' calculation of the premium value of Korholz's Gypsum stock.

The trial court found that the average price of Gypsum stock in the over-the-counter market on December 13, 1965, was $6.875 per share. It then found that shares in a control block had an additional, or premium value of 20%. Using that premium value ($8.25), the exchange ratio of 1.9 to 1 resulted in a derived price of $15.675 for the Susquehanna shares acquired by Korholz on December 13. Since this price was higher than the derived price of $[illegible]4 received in July, Korholz realized no profit.

Plaintiff attacks the premise that $6.875 represented the value of Gypsum stock on December 13, and also the finding that Korholz's control block was worth a premium of 20%. We think both findings are supported by the evidence.

On December 13 there was no actual trade of Gypsum stock. Quotations in the over-the-counter market ranged on the "bid" side from 6-¾ to 6, and on the "asked" side from 7-¼ to 7-⅛.[7] The court, using a point above the high bid and below the lowest asking price, concluded that

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[6] Robert A. Podesta, President, The Chicago Corporation, and Robert M. Leopold, a Vice President of New York Hanseatic Corporation.

[7] One of the exhibits shows an asking price of only 6-½, but this was a report which had been received in the mail and reflected the market at an earlier time; both expert witnesses agreed that that figure should be disregarded.

the value was 6-⅞.* The expert testimony describing the over-the-counter market in Gypsum itself over a period of time clearly supports this finding as a reasonable interpretation of the facts.

Plaintiff makes three objections to the finding that Gypsum shares were worth $6.875 on December 13. First he contends as a matter of law that the low bid price of $6.00 was the only acceptable evidence of value because the policy of § 16(b) requires the court to adopt an interpretation of the facts that will "squeeze out all possible profit." *Cf. Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 239 (2nd Cir. 1943).

The comment in that case may guide a court's choice between two reasonable interpretations of the facts. It does not require a court to adopt a completely unrealistic interpretation of the market. In this case the evidence shows that the owners of Gypsum were unwilling to sell for less than $7.125 a share and prospective purchasers were willing to pay $6.75. Clearly a finding that the market value was only $6.00 would be unsupportable.

Second, plaintiff contends that nothing short of an actual trade can evidence market value on a given day. The testimony of the experts was to the contrary, and we agree with the district court that it was credible. There is ample precedent for this view. See *Jaffe* v. *Cuthbertson*, 412 Ill. 606, 615-16, 107 N.E.2d 715, 721 (1952); *Allender & Co.*, 9 S.E.C. 1043, 1057-58 (1941); *Charles Hughes & Co.*, 13 S.E.C. 676, 678-79 (1943).

Third, plaintiff correctly points out that the market quotations are for 100 share lots and do not establish the value of a block of several hundred thousand shares.

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* Decimally, the median price would have been approximately $6.93, but expert witness Leopold apparently rounded off to a fraction and estimated the value at 6-⅞. Expert Podesta testified to a value of 6.93 which he rounded to 6.90. The trial judge, by using the 6-⅞ figure, stated decimally as $6.875, thus took the figure most favorable to plaintiff.

Such a quantity of stock offered for sale on the open market might well drive the price down precipitously. But no such "dumping" took place or was contemplated. The experts made no attempt to estimate the price that would be realized in such a hypothetical situation. They merely used the market quotations as one element in their calculation of the value of Korholz's stock. Their opinion that his holdings had a greater value than smaller lots was supported not only by their expert judgment but also by the fact that he received a premium offer not long before the merger.[9] We think the evidence amply supports the finding of $6.875 as an "average price" or value of Gypsum stock on December 13, 1965.

Plaintiff also attacks the finding that Korholz's shares had a premium value of 20%. First, he argues that a premium may only be recognized in the context of a negotiated transaction, and that Korholz's position as a fiduciary foreclosed him from seeking more favorable benefits from the merger than other Gypsum stockholders.[10] The argument loses sight of the fact that the valuation issue turns not on the value of what Korholz might receive, but rather on the value of what he delievered. Whether he did or could negotiate a favorable bargain is beside the point. Our only concern is with the value of the Gypsum block which he surrendered. The finding that those shares had a premium value is well supported by the record.

Second, plaintiff contends that the amount of 20% is excessive. One expert estimated the premium at 25%; the other in the range of 20% to 30%. The court accepted the more conservative estimate.

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[9] The price offered Korholz was $8.00, somewhat lower than the value found by the court (which is consistent with Korholz's refusal of the offer), but still higher, on a 1.9 ratio, than the July 2, 1965, price of $15.114.

[10] Of course, his fiduciary position would not prevent him from receiving *less* favorable benefits by giving up something of greater value than that surrendered by other Gypsum shareholders. Thus, plaintiff's argument does not meet the facts as found by the trial court.

Plaintiff argues that this estimate was less probative than the evidence showing the actual premium which Korholz paid when he made the original purchase from the Lannan Group on May 25, 1965. The cash price of $15.00 represented a premium of only about 10.7%[11] over the price of Susquehanna on that day.

There are a number of answers to this argument. The May transaction involved a different company (Susquehanna, not Gypsum), a relatively smaller block of stock, and took place at a different time. The price was set by the Lannans at a level which would make the prompt consummation of an all-cash transaction possible. The reaction of Korholz and the Gypsum board of directors, as well as the insurance companies and the Bank will tend to suggest that it was a bargain purchase from the buyers point of view. Finally, as the above discussion demonstrates, the argument is advanced in a factual context in which the district court's appraisal of the entire record is entitled to a special deference.

We are satisfied that the district court correctly concluded that Korholz realized no short-swing profit.

V.

There is one final contention to consider. After the trial was concluded, and based on the district court's finding that Korholz was a fiduciary for Gypsum with respect to the 430,000 shares of Susquehanna acquired on May 25, 1965, plaintiff filed a motion to amend the judgment to require Korholz to convey 25,000 additional shares to Gypsum.

The original discussions with the Lannan Group had contemplated a purchase of 455,000 shares. However, in May one member of the group, Wheelock Whitney, was out of the country. For that reason his 25,000 shares

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[11] The premium could be computed as high as 12% or as low as 9.6%, depending on the combination of ask and bid prices used.

could not be included in the May 25 purchase.[12] Accordingly, Korholz and an associate gave Whitney an option, exercisable by August 21, to sell his 25,000 shares at the $15.00 price. Whitney exercised the option and Korholz bought the stock.

Originally plaintiff argued that this purchase gave rise to § 16(b) liability. He has since abandoned that claim and, after judgment, argues that Korholz as a Gypsum director appropriated a Gypsum corporate opportunity. Assuming that plaintiff, as a Susquehanna shareholder, has standing to attack a pre-merger transaction affecting Gypsum, which is at best doubtful, and disregarding the inconsistency between this contention and plaintiff's denial of Korholz's fiduciary capacity between June 12 and July 2, 1965, we think it is plain that the attempt to raise an entirely new series of issues, both factual and legal, after judgment comes too late.[13] The trial court properly denied the motion to amend the judgment.

The judgment is affirmed.

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[12] And also for that reason, the May 12 resolution of Gypsum's directors referred to only 430,000 shares and not 455,000.

[13] *Cleary* v. *Indiana Beach, Inc.*, 275 F.2d 543, 546-47 (7th Cir. 1960), *cert. denied*, 364 U.S. 826 (1960); *Macris* v. *Sociedad*, 245 F.2d 708, 710-11 (2d Cir. 1957), *cert. denied*, 355 U.S. 922 (1958). The Supreme Court in *Forman* v. *Davis*, 371 U.S. 178 (1962), acknowledged that "the grant or denial of an opportunity to amend is within the discretion of the District Court," 371 U.S. at 182, and there required that there be a "justifying reason appearing for the denial." *Id.* Here the judge's order denying the motion is supported by "justifying reasons." He concluded the amendments "would not cause the pleadings on the judgment to conform to the evidence either as presented at trial or as formulated in the findings of fact," and that the amendments rested on a "theory never presented at trial." Indeed, the theory was directly inconsistent with plaintiff's theory of the case at trial and raised entirely new issues on which no evidence had been adduced, such as whether the Whitney transaction was a corporate opportunity in the first place and, if so, whether Korholz could defend on the grounds that the corporation had rejected the "opportunity" as to the Whitney shares.